



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 829 of 2012

GRACE N.

AGARE.....CLAIMANT

VS

PERMANENT SECRETARY, MINISTRY OF STATE FOR

**IMMIGRATION & REGISTRATION OF PERSONS.....1ST
RESPONDENT**

**MINISTRY OF STATE FOR IMMIGRATION & REGISTRATION OF PERSONS.....2ND
RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3RD
RESPONDENT**

The Claimant testified under oath and her testimony may be summarized as follows:-

That she was employed as a temporary Senior Subordinate Staff by the Ministry of State for Immigration and Registration of Persons, hereinafter the 2nd Respondent on the 12th April, 1996. She worked as such until the 28th April, 2004 when she was promoted to Job Group 'E' with effect from the said date.

She worked in the records requisition office which dealt with 2nd Generation National Identity Cards.

On 10th December, 2004 she was charged together with 3 others with a criminal offence of attempting registration of a person by false pretences contrary to Section 320 of the Penal Code, Cap.63 Laws of Kenya, before the Chief Magistrate's Court at Nairobi. On 17th December, 2004 she was interdicted and placed on half pay until 19th June, 2008.

On 19th June, 2008 while the trial was pending and she was out on bond, the 2nd Respondent suspended her from duty without pay.

On 4th September 2007, the 1st Respondent issued a notice to her to show cause why she should not be dismissed from employment for gross misconduct. She responded in writing stating reasons why she should not be dismissed from employment especially because she believed she was innocent and the trial was still pending. In the letter dated 6th September, 2007 marked Annex 'H' to the memorandum of claim she explained that she could not have committed the alleged offence because she was just a cleaner and had no access to the computer systems that were used to produce identity cards. She added that only employees of the 2nd Respondent who had updated authorized passwords could access the electronic systems used to process registration of persons. She further stated that she was stationed in the Records Requisition Section with responsibilities of messengerial and cleaning duties. She requested the 1st Respondent to withhold any action against her until the criminal trial was heard and determined. She pointed out that a Ruling was to be delivered on 28th September, 2007. She was dismissed from work on 1st September, 2008.

The letter of dismissal of the same date stated that she had been dismissed from the service on account of gross misconduct with effect from 17th December, 2004. She was given leave to Appeal against the decision within six (6) weeks from the date of the letter.

She appealed against the decision to dismiss her by a Letter of Appeal dated 19th September, 2008 but the Appeal was dismissed on 2nd November, 2009. She was informed that she was at liberty to apply for a Review of the decision to the Commission within a period of one (1) year. On 9th July, 2009 she was acquitted of the charges leveled against her before the Chief Magistrate's court.

On 14th October 2010, she lodged a second Appeal to the Public Service Commission. The 2nd Appeal was dismissed on 20th December, 2010 and she was requested to return all the employer's possessions.

Upon dismissal, she was not paid any terminal benefits. She claims the dismissal was unlawful and unfair in that she had not committed any gross misconduct and that she was vindicated by the acquittal by the Chief Magistrate's court. She seeks a declaration that the decision to dismiss her was unlawful and null and void. That the said decision be set aside and that she be reinstated to her employment with effect from the date of the dismissal. That she be paid salary arrears from the date of interdiction and she be paid compensation and general damages for unlawful dismissal.

The Claimant exhausted the internal machinery of Appeals against the decision to dismiss her on 20th December, 2010 when the 2nd Appeal was dismissed by the Public Service Commission.

The thirty days statutory notice was sent to the 3rd Respondent on 21st October, 2011 and this suit was

filed on 17th May, 2012. As at the time the matter was heard on 9th October 2012, the Respondent had not filed any response to the claim. The Claimant was given ten (10) days to file written submissions and the matter was set for mention on 19th October, 2012.

Meanwhile, the Respondent filed a Memorandum of Reply without a verifying Affidavit on 12th October 2012, without leave of the court and went ahead to file written submissions on 15th October, 2012 without approaching the court at all to seek leave having not participated in the hearing of the matter. The matter was mentioned on 30th October, 2012 when Mr. Mariaria for the Claimant confirmed that he had filed final submissions on 23rd October, 2012. The Respondents did not appear for the mention. The Court ordered that judgment will be delivered on notice.

Given the circumstances in which the Respondent sneaked in documents in the court file without leave of the court, the court will not consider them. Condoning this kind of conduct by counsel would be inimical to the administration of justice as others would follow suit in such sharp practices.

The Court has evaluated the contents of the Memorandum of Claim and the annexures thereof, the evidence of the Claimant in Court and make the following findings of fact:-

That she was acquitted of the offence of ‘Attempting to procure registration by false pretences contrary to Section 320 of the Penal Code’ in criminal case No.2445 of 2004 by the Chief Magistrate’s Court at Nairobi.

That various disciplinary forums held by the Respondent found her guilty of gross misconduct and dismissed her from employment. The dismissal took place after she had been found not guilty by the Chief Magistrate and acquitted of the charge. She had made a cogent and consistent explanation against the charges leveled against her during the disciplinary hearings and before this court.

The court is aware that in Criminal trials, the standard of proof required to establish the guilt of an accused person is beyond reasonable doubt. Section 43(1) of the Employment Act, 2007 places the burden on the employer to prove the reason for termination as follows:-

“43(1) in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45”.

The standard of proof required of an employer is on a balance of probabilities unlike that of an accused person.

The employer must in the least show:-

1. That he/she had a valid reason to terminate
2. That the reason is a fair one and was related to the employees’ conduct, capacity or compatibility or was based on operational requirements of the employer; and that the employment was terminated in accordance with a fair procedure.

To discharge this onus, the Employer must in the least place these facts before the court by way of oral or documentary evidence.

The Respondent in this case failed to file any pleadings before the court prior to the hearing of the matter nor was any evidence adduced in court to discharge this onus.

The Claimant, in addition to the explanation she gave to the court presented the judgment of the Chief Magistrate in criminal case No.2445 of 2004 wherein she was acquitted of having committed the alleged offence by the Court. The Court has perused the judgment aforesaid and noted that the evidence she

presented before the Magistrate's Court was materially consistent with that she had presented before this court. This is important in evaluating her credibility and the court is satisfied with the veracity of her testimony before this court.

Having said that and aware of the standard of proof required in disciplinary and civil proceedings the court finds that the Respondent has failed to satisfy the requirements of Section 43(1) of the Employment Act 2007 in that the reason or reasons for termination of the employment of the Claimant have not been proven and the court deems the said termination to have been unfair within the meaning of Section 45 of the same Act. The Claimant has therefore proven her case on a balance of probabilities to the satisfaction of the court.

Remedies

In her Statement of Claim, the Claimant prays for the following reliefs:-

- (i) Payment of salary arrears from the day of interdiction until the date of termination.
- (ii) Reinstatement to her previous employment with the Government without loss of benefits and/or continuity of service and in the alternative payment of terminal benefits in terms of her employment contract.
- (iii) General damages for the unfair termination.
- (iv) Costs of the suit.

The Claimant expected to work as a Civil Servant and retire at the age of sixty years unless her services were terminated lawfully. The Court has found that her services were unlawful and unfairly terminated on the 1st September, 2008.

The Industrial Court Act, 2011, Section 12(3)(vii) empowers this court to reinstate an employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written Law. It is now well over three years since the termination took place and the Court will, therefore not order for reinstatement of the Claimant and will in the alternative direct the Respondent to:-

- (i) Pay salary arrears from the date of interdiction (17/12/2004) to the date of termination on 1/9/2008.
- (ii) Pay all terminal benefits due to the Claimant by fact of termination of her contract of service.
- (iii) Section 12(3)(v) of the Industrial Court Act permits the court to make an award of compensation in any circumstances contemplated under the Act or any written Law. In this respect, Section 49(1) (c) of the Employment Act, 2007 contemplates award of the equivalent of a maximum of 12 months' gross monthly wage or salary of the employee at the time of termination where the court finds that the termination was unjustified.

In this regard, the Claimant was kept on interdiction for a period of close to four (4) years on ½ pay and then was on suspension without pay for over one year prior to the termination on 1st September, 2008. The letter of termination backdated the same to the 17th December, 2004.

The effect of this was to backdate her loss of income by five (5) years. This was an extreme measure especially because the Claimant had already been found not guilty of the charges leveled against her before the Chief Magistrate's Court. Her expectation to work until the retirement age of 60 was unjustifiably curtailed. The Court finds this a proper case to award 12 months' salary as compensation for the unlawful and unfair termination.

The Court directs the Claimant to compute the award of the court in the three (3) heads of Salary Arrears;

terminal benefits and compensation and file the same within 14 days from the date of this judgment. The Claimant is directed to serve the Respondents with the computation. The Respondents are at liberty to Respond to the computation within 14 days from the date of service. Thereafter an award on Quantum will be delivered on Notice.

It is so ordered

DATED and DELIVERED at Nairobi this 28th day of November, 2012.

Mathews N. Nduma
PRINCIPAL JUDGE